13309

SUPREME COURT OF THE UNITED STATES.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y.,
Plaintiff in Error,

vs.

THE BUFFALO GERMAN INSURANCE COMPANY.

BRIEF OF PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Statement.

This case comes to this Court upon a writ of error to the Court of Appeals of the State of New York. Such writ of error brings to this Court for review a judgment of that Court affirming the order and judgment of the Appellate Division of the Fourth Department, which in turn affirmed the judgment entered on the findings of Mr. Justice Lambert of the Supreme Court of the State of New York; such first mentioned judgment having been so entered in Erie County Clerk's Office October 16th, 1900.

The Judgment Here for Review.

The judgment is a judgment in an action in equity, whereby it is adjudged "that by and through the pledge of Emanuel "Levi to the plaintiff, of the capital stock of the defendant, "evidenced by the certificates of stock of the defendant, num-"bered B 58," etc., "and the sale thereof by the plaintiff on the "30th day of June, 1896, the plaintiff became and was the owner "of each and all of said certificates of stock, and was and is

"entitled to a transfer thereof on the books of the defendant;" also "that the dividends" thereon "amounting to the sum of "$12,135.83, belong to and are the property of the plaintiff;" also "that upon the tender of said certificates * * * the "defendant shall, upon request so to do, transfer the said cer- "tificates of stock * * * on the books of the defendant, "to the plaintiff." (Record, p. 16.)

Facts.

Enough has been said about the claims of the parties and the language of the judgment rendered, to make apparent the necessity for a clear understanding of the precise facts here involved. Fortunately, those facts are not in dispute, but were found by the Trial Court, and may be briefly stated to this Court.

The plaintiff in error became a national bank in 1865, and Emanuel Levi thereafter became the owner of 450 shares of its capital stock. (*P. 11, Findings I and II.*)

These shares of capital stock were not issued to Mr. Levi until 1888, but were in the form following:

"Number B–60. Shares 100.

"STATE OF NEW YORK,

"THIRD NATIONAL BANK OF BUFFALO.

"*This is to certify* that Emanuel Levi is the owner of one "hundred shares, of one hundred dollars each, of the capital "stock of the Third National Bank of Buffalo, subject to the lien "or liens referred to in section fifteen of the by-laws of said bank "in the following words:

"'No transfer of the stock of this association shall be made "'without the consent of the board of directors, by any stock- "'holder, who shall be liable to the association either as principal "'debtor or otherwise, which liability shall be a lien upon the "'said stock and all profits thereof and dividends.'

"And that the said stock is transferable only on the books of "the bank by him or his attorney on the surrender and cancel- "lation of this certificate and compliance with said by-laws.

"Dated, Buffalo, N. Y., this 2d day of July, 1888.

"CHARLES A. SWEET, President.

(*Finding II, p. 11.*) "N. ROCHESTER, Cashier."

The certificates of stock were issued in this form, pursuant to a by-law of the Board of Directors of the bank adopted February 18th, 1865, which reads as follows:

"Transfers of stock.—Sec. 15. The stock of this bank, shall be "assignable only on the books of this bank subject to the restric- "tions and provisions of the act, and a transfer book shall be "kept in which all assignments and transfers of stock shall be "made. No transfer of the stock of this association shall be "made without the consent of the board of directors by any "stockholder who shall be liable to the association either as "principal debtor or otherwise, which liability shall be a lien "upon the said stock and all profits thereof, and dividends and "certificates of stock shall contain upon them notice of this pro- "vision." (*P. 13, Finding XIV.*)

This by-law was authorized by the Comptroller of the Currency February 9th, 1865. (*P. 13, Finding XIII.*)

The transaction between Levi and the Bank in which he was thus a stockholder, did not rest simply on the by-laws and the shares of stock, as to security, as appears from the finding of the Court:

"That on the 1st day of October, 1890, the said Emanuel Levi "was indebted to the defendant in the sum of thirty-one thous- "and dollars, which had existed, in whole or in part, since May "1st, 1890, and as security for the payment thereof, the said "defendant held promissory notes of the said Emanuel Levi. "That upon the 1st day of October, 1890, the said Emanuel Levi "applied for a further loan of twelve thousand dollars, and pro- "posed to secure the same by note made by himself and endorsed "by his son, Louis Levi, and to treat and consider as delivered "to the defendant the stock which he owned in the defendant "corporation, and which was then in the safe deposit vaults of "the Buffalo Loan and Trust Company as security for the pay- "ment of the said indebtedness of thirty-one thousand dollars, "and the loan that day made; and that thereupon, and in "reliance upon such further and additional security for the pay- "ment of the indebtedness and the endorsement of the paper of "the said Emanuel Levi of twelve thousand dollars by his son, "Louis Levi, the said defendant made the said loan of twelve

"thousand dollars and extended the time of payment of the "thirty-one thousand dollars old indebtedness." (*Finding XV, pp. 13–14.*)

The loans of the Insurance Company were made still later, and December 3d, 1890, for $25,000; August 13th, 1891, for $20,000; and May 25th, 1892, for $10,000; Emanuel Levi, in violation of his agreement with the Bank, delivering to the Insurance Company "all of the certificates hereinbefore mentioned, together with an assignment and receipts," as collateral security. (*Findings III, IV & V, pp. 11 & 12.*) They were not then in fact transferred on the books of the Bank. The contrary is found.

The Court expressly finds:

"That said plaintiff did not at any time until June 30, 1896, "demand of said defendant a transfer of said stock, or any part "thereof, or the payment to it of any dividend thereon." (*P. 15, Finding XVIII.*)

The Court finds that the dividends declared on and after July 1st, 1896, after the demand was made therefor, amount to $12,-135.83. (*Finding XIX, p. 15.*)

The Court finds that June 30th, 1896, the Insurance Company assumed to sell these certificates of stock on notice to the Bank, and to purchase the same upon the sale thereof, and thereupon demanded of the Bank the transfer thereof on its books, and that dividends be paid to the Insurance Company. (*Findings VIII to XII, pp. 12 & 13.*)

Opinion of the Court of Appeals.

The opinion of the Court of Appeals upon which this judgment is rendered, is reported in 162 N. Y., 168, and appears in this record, beginning at page 22. This opinion resulted in the reversal of a previous judgment of the Supreme Court of the State of New York, and of the Appellate Division of the Supreme Court for the Fourth Department, 29 App. Div., 137. When this case was tried the second time before Mr. Justice Lambert, as the consequence of the Court of Appeals decision, he found the facts quite fully and more favorably to the Bank than they were found on the previous trial, but, deeming himself concluded by the

opinion of the Court of Appeals, decided the case against the Bank upon the law.

The opinion of the Court of Appeals gives such a construction to the Act of Congress, as amended in 1864, that the Bank is denied any claim upon the stock to secure the loan to Emanuel Levi, and the Insurance Company is permitted to acquire title to Emanuel Levi's stock by virtue of a *subsequent* lien thereon.

The Bank insists that there is nothing in the Act of Congress that required the Court to deprive it of its lawful rights, or that required the Court of Appeals to give the Insurance Company an advantage over it which the Insurance Company is not entitled to as the mere assignee of Levi, and *subsequent* in time and in right. Plaintiff in error insists, that, it not being found that the Insurance Company was a *bona fide* encumbrancer, or took without notice of the Bank's rights, it follows the Insurance Company stands in the shoes of Levi.

Errors.

The Bank excepted to the conclusions of law of Justice Lambert at the Trial Term. Those exceptions bring up the question of whether or not the Insurance Company, by virtue of anything in the Act of Congress, was entitled to the judgment ordered by the Court upon the facts found by the Court. (*Pp. 15, 16, 17, especially exceptions bottom p. 16, top of p. 17.*)

Errors Assigned.

1. The essence of the first error assigned is the conclusion of law, as to the stock certificates involved, that the Insurance Company "was entitled to a transfer thereof on the books of the "defendant."

2. The essence of the second error is that "the dividends "declared on said stock * * * since July, 1896, belong to "and are the property of the plaintiff * * * of the sum "of $12,135.83."

3. The essence of the third error is that "the plaintiff is "entitled to have the said stock transferred on the books of the "defendant * * * and to recover * * * $12,135.83."

4. The essence of the fourth error is that the Court of Appeals erred because it did not reverse the judgments of the courts below and order "that the plaintiff's complaint be dismissed."

5. The essence of the fifth error is that the Court erred in denying the defendant "rights claimed by it under the laws of *the United States relating to national banks.*"

6. The essence of the sixth error is that the Court erred in not holding that the shares of the stock in question were subject to the Bank's claim thereon "in the sum of $9,886.33."

7. The essence of the seventh error is that the Court erred in not requiring the Insurance Company to extinguish the Bank's claim for $9,886.33 before requiring the Bank to transfer the stock in question upon its books.

8. The essence of the eighth error is that the Court decided against the authority exercised under the statutes of the United States, pursuant to which the Bank claims security upon the certificates of stock in question. (*Record, pp. 35, 36.*)

Broadly, the Bank's position may be succintly stated like this: The Bank was authorized to issue stock subject to the transfer conditions prescribed by its articles of association, by-laws, and certificates of stock. It was the lawful right of the Bank to do business under the Act of Congress and to require Emanuel Levi, when he requested an extension of time and an additional loan, to give it security upon his shares in the Bank, as a condition of granting his request. The Act of Congress does not forbid a bank from entering into such an arrangement at such a time, with a stockholder, and does not give the Insurance Company the right thereafter to make a loan upon the same stock and ignore the Bank's rights with respect thereto.

A national bank has the same business rights as any other business corporation. It should not be deprived of a lawful claim upon its stock, lawfully obtained for a lawful purpose. Nothing in any Act of Congress, or any decision of this Court, requires such a decision as that made in the court below. It is not just.

POINTS.

I.

The plaintiff in error, by its articles of association, its by-law, and the certificate of stock, gave notice to all the world of its claim on the stock. It further obtained an equitable lien on the stock of Emanuel Levi by the arrangement entered into with him, which he, or his estate, could not dispute. The Insurance Company had notice of the Bank's claim, in the stock itself, and the Insurance Company as the assignee of Emanuel Levi, stands in his shoes, and is estopped from claiming any greater rights than Emanuel Levi, or his estate, would have had in the stock in question.

(*a*) *The Bank's Position.*

The justice of the Bank's claim is clear. Emanuel Levi was a large stockholder in the bank. This bank had been organized in 1865. Its articles of association had been approved of by the Comptroller. These articles of association contain this express provision:

"No transfer of the stock of this association shall be made "without the consent of the board of directors by any stockholder "who shall be liable to the association either as principal debtor "or otherwise, which liability shall be a lien upon the said stock "and all profits thereof, and dividends and certificates of stock "shall contain upon them notice of this provision." (*P. 13, Finding XIV.*)

This provision was inserted in the certificate of stock. When Emanuel Levi acquired his stock, he knew such stock contained this provision. By acquiring stock with such a provision in it, he assented to the terms and conditions thereof. Further than that, by acquiring stock in a national bank, which contained a by-law to the same effect, he assented to the terms and conditions of that by-law. In addition to this, when he applied for an extension of time on a loan that had been made to him, and for a further loan of money, it was expressly understood between him and the President of the bank that the bank should have a lien

upon this stock as the condition of such extension and such loan. That the President of the bank, who was not a lawyer, supposed that he was fully protected by this by-law and this certificate of stock, and this understanding with Levi, is clear from the fact that he did not require these certificates of stock to be brought in, although he did require certificates of stock in another bank to be brought in, as collateral security to the loan made. That certificate of stock in the other bank has been sold and the proceeds applied on this loan. The loan being only partly paid, the bank proceeded to apply the dividends on this stock to the satisfaction of this loan.

Upon the other hand, the Insurance Company took this certificate of stock with notice of this situation, because that notice is contained in the certificate of stock itself. The Insurance Company took the certificate of stock with notice of the situation, because a party acquiring stock in a corporation takes with legal notice of the by-laws of the association and of the powers of the directors of such corporation. If such by-laws give the directors power to refuse to transfer stock while a stockholder is indebted to the bank, a party acquiring the stock in such a bank is bound to take notice that the directors of the bank have this power. It matters not whether a lien can be created on the stock itself by the by-law, for if the directors have the power to refuse to transfer the stock while the stockholder is indebted, such power is a perfect defense to an action to compel them to transfer the stock in a case of this charactor. Stock in a corporation is not negotiable paper, and has only a few characteristics of negotiable paper. Such stock is personal property, and salable like similar personal property. A person buying stock in a corporation is bound to know its general powers by statute, the powers of its directors under by-laws, and the terms and conditions upon which stock may be transferred upon its books. A person buying stock in a corporation cannot compel the corporation to transfer stock upon its books contrary to its by-laws. If the stock is *silent* as to any by-law, or any power of the directors, a nice question may arise as to a bona fide purchaser of the stock.

This case does not differ in substance from the case of *Knight vs. Old National Bank, 3 Cliff., 429.* That case was so carefully considered, and the authorities, state and national, were so

patiently examined, and so intelligently commented upon in the opinion there delivered, that I call particular attention to it. Instead of writing and printing a great deal, I beg to make extracts sufficient to show the character of the case and the points in it upon which the Court laid stress. That was a case where the bank in question was organized under the Act of June 3d, 1864, precisely as the Third National Bank here was organized under the same Act, and probably at about the same time. The defense there interposed to the action was the same as that here interposed. This sufficiently appears from the following extracts from the statement of the case (*pp. 430, 431*):

"The defendants justified their refusal to allow the stock to be "entered upon their books as transferred, upon the ground that "the proprietor and assignor of the stock was indebted to the "Bank, that the Bank, at the time of the assignment, and of the "demand, held two bills of exchange, drawn by Dorr and Mor-"gan, and accepted by the firm, of which the holder and assignor "of the stock was a copartner in trade. * * * *

"Provision was made in the articles of association that the "board of directors should consist of eight stockholders, and that "a majority of the directors should constitute a quorum to do "business, and that the directors should have power to make all "by-laws that might be proper and convenient for them to make "under said act for the general regulation of the business of the "association, and the entire management and administration of "its affairs, which by-laws might prohibit, if the directors should "so determine, the transfer of stock owned by any stockholder "who might be liable to the association either as principal or "debtor, or otherwise, without the consent of the board.

"On the 10th of January, 1867, the board of directors, seven "being present, adopted the following by-law: 'That no person "'indebted to the Bank shall be allowed to sell or transfer his or "'her stock without the consent of a majority of the directors, "'and this whether liable as principal or surety, and whether "'the debt or liability is due or not.'"

In giving his reasons for the decision there rendered, Clifford, J., there said (*p. 433*):

"Provisions to the same effect were also contained in the "charter of the Bank of Washington, and the same court, twenty "years later, held, in a contest between The United States and "the Bank, that every shareholder of a bank who draws or in- "dorses a note to procure a loan from the bank, is bound to "know the terms of the charter and by-laws; and his signature, "if it is so provided in the charter, is an inchoate pledge of his "stock as security for such paper; that his stock gives credit to "the loan, and that the bank under such circumstances grants "the loan on the faith of that security. (*Brent, etc., vs. Bank of "Washington, 10 Pet., 615.*)"

Speaking of the by-laws which prevented the stockholder from transferring his stock while indebted to the Bank, in that case, the Court further said (*pp. 436-437*):

"They were authorized by the articles of association in this "case to adopt the by-law in question, and it is expressly admit- "ted in the case of *Rosenbach vs. The Salt Springs National Bank, "53 Barb., 505*, that where the articles of association confer the "power to make such a by-law, that the by-law is valid, and "that it binds the subsequent purchaser of the stock, and the "court is not referred to any decision where a contrary doctrine "is mentioned. Comment upon the provisions of the prior act "of Congress is unnecessary, as that is repealed, and the case "before the Court is governed entirely by the act now in force. "(*12 Stat. at Large, 665; 13 Ibid., 118.*)"

As to the argument here made that the Banking Act forbids the bank to loan on the security of its own shares, the Court there said (*pp. 437, 438, 439*):

"Banking associations, formed under the act of Congress, are "forbidden by section 35 of the act to make any loan or discount "on the security of the shares of its own capital stock, or to be "the purchaser or holder of any such shares, unless such security "or purchase shall be necessary to prevent loss, upon a debt pre- "viously contracted in good faith. (*13 Stat. at Large, 110.*)

"Just such a provision is contained in the banking law of the "State of Connecticut, where it is enacted that no bank shall "make any loan or discount on pledges of its own stock, and the

"Supreme Court of that State held that that enactment did not "invalidate a provision in the certificates that the stock of the "shareholders should be subject to their indebtedness to the in- "corporation, that a loan or discount on a pledge of stock is an "expression of mercantile origin, and is understood to mean a "loan or discount, where the stock of the person for whose bene- "fit the loan or discount is made, or that of another is expressly "and specifically pledged at the time for its payment. *Van Sands "vs. Middlesex Co. Bank, 26 Conn., 144.* Such a provision, for- "bidding loans on such security, is not inconsistent with the "power conferred in the articles of association, as was held by "the Supreme Court of Ohio in the case of *Conant et al. vs. Seneca "Co. Bank, 1 Ohio St. R. 298*, to which particular reference is "made, as showing the reasons upon which the conclusions rest. "*In re Bigelow, 1 B. R. 203; Ex parte Plant, 4 Dea. & Chitt. R., "160.* Congress undoubtedly intended in repealing the provi- "sion in section 36 of the former act, that no shareholder in any "association under the act should have power to sell or transfer "any shares held by him, in his own right, so long as he should, "either as principal debtor, surety, or otherwise, be liable to the "associations for any debt which should have become due, and "remained unpaid, etc., to relieve the holders of bank shares "from the restrictions imposed by that section, *and in a case "where the articles of association did not contain any provision "authorizing the directors to adopt a by-law providing for such re- "straint in the sale and transfer of shares*, the Supreme Court held, "that loans made by national banks do not give a lien to the "bank on the stock of such stockholders, *but the articles of assso- "ciation in the case at bar do confer that authority upon the direct- "ors, and the directors having exercised that power under the au- "thority conferred in the articles of association, and adopted the by- "law in question, the same is clearly valid, and furnishes a complete "justification to the defendants for their refusal to record the transfer "of the stock, as demanded by the plaintiff. (Bank vs. Lanier, 11 "Wall., 374)."

"Prior to the appeal of the Antecedent Act the directors in "that case had adopted a by-law providing for such a restraint "in the sale and transfer of the stock owned by a delinquent

"stockholder; but the Supreme Court held that the repeal of "the prior act, inasmuch as it removed the restriction, left the "by-law without any foundation, and the by-law, which pro- "vided for the same restriction, also fell with the repeal of the "act on which it rested.

"Well founded doubt as to the correctness of that decision "cannot be entertained, as the by-law was adopted under the "act of Congress, which was repealed, and not under the articles "of association, which did not confer any power upon the direc- "tors to adopt any such restriction. But the facts in the case "at bar are entirely different, as the articles of association in this "case expressly provide that by-laws may be adopted which "shall 'prohibit, if the directors shall so determine, the transfer "'of stock owned by any stockholder who may be liable to the "'association, either as principal debtor or otherwise, without "'the consent of the board.' Opposed to this conclusion, it may "be suggested that the shares of a stockholder are evidenced by "certificates; that such certificates are sometimes used as collat- "erals, and that they are bought and sold in the market, and "that a person purchasing without due inquiry may suffer loss. "But if that suggestion is made there are two answers to it, "either of which is decisive.

"That such certificates are not negotiable instruments. Such "a certificate does not partake of the character of a negotiable "instrument; and the *bona fide* assignee of the same, with power "to transfer the stock, takes the certificates as a contract, sub- "ject only to the equities which existed against his assignor. "*Mechanics Bank vs. Railroad, 3 Kern, 623; Bank vs. Lanier, 11* "*Wall, 377; Bank of Georgetown vs. Laird, 2 Wheat, 393; Steb-* "*bins vs. Ins. Co., 3 Paige, Ch. 350.*

"That a purchaser cannot acquire any greater rights than "his grantor possessed, as all persons dealing in the stock of a "bank are bound to take notice of the charter, or articles of "association, which is a proposition too generally admitted to "require argument in its support."

The Maine Supreme Court has very succintly stated the law on this subject in a much more recent case between the *Bath Savings Institution* and a *National Bank, 89 Me., 500.* The ques-

tion there involved was whether or not a party was entitled to the liquidation dividends of a bank that was being wound up. The Court thus succintly states the law and the result of the decisions upon this subject (*p. 504*):

"'The negotiability or transferable quality of the stock of a "'national bank depends upon the laws of the United States,' "and is not governed by state laws. *Continental National Bank "vs. Eliot, 7 Fed. Rep., 370; Dickenson vs. Central National Bank, "129 Mass., 279; Merchants Bank vs. State Bank, 10 Wall, 604; "Central National Bank vs. Williston, 138 Mass., 248.*

"A national bank may, by law, subject the shares of a stock-"holder to a lien for his indebtedness to the bank, and the "assignee of such shares cannot procure a transfer of the same "upon the books of the bank, until such indebtedness shall "have been paid. *Knight vs. The Old National Bank, 3 Cliff, "429; Union Bank vs. Laird, 2 Wheaton, 390.*

"The assignee of shares with power to transfer the same, takes "an absolute title to the shares subject to any lien created by "the articles of association or by-laws thereunder, and on present-"ment of his certificates many require new ones to be issued to "him as against subsequent assignees or attaching creditors. "*Bank vs. Lanier, 11 Wall, 369; Moores vs. Bank, 111 U. S., 163-"166; Dickinson vs. Bank, supra; Sibley vs. Quinsigamond Nat. "Bank, 133 Mass., 515.* Upon this subject, *Bank vs. Eliot, supra,* "is very instructive, and collates and compares many author-"ities upon the subject. (See also *Johnston vs. Laflin, 103 U. S., "800.*)

"The doctrine of the cases is, *where there is no provision in the "law of the bank, as in this case, to subject shares to the payment of "any debt of the shareholder to the Bank,* that the transferee of "shares that are made transferable only on the books of the bank "by the shareholder or his attorney, and a surrender of the cer-"tificate, as here, takes a perfect title to the shares," &c.

(*b*) *Notice.*

The key-note of this case is found in the articles of association, the by-law of the bank, and above all, the certificate of stock, which calls attention to these very things and prevents any

person from buying a share of stock without taking it subject to any demands or any equities against the holder thereof. Where banks have been defeated in litigations of this character, the cases show clearly that the assignees of the the stock have been parties, and have acquired the stock for value, in good faith, *without notice* of any claims of a bank, or any equities of a bank as against the holder thereof. Such cases have been cases where the stock itself failed to give any notice whatever of the claims or demands of the bank as against the holder of the stock sold and directed to be transferred. Such cases have been cases, therefore, of a secret demand or lien of which the purchaser had no notice. The equity of such a purchaser as against the vendor or the bank, is apparent.

But here, the stock itself giving notice of the demands of the bank thereon, and there being no finding of fact, as there could be no finding of fact, that the Insurance Company did not know of the demands of the Bank against Levi, and of its legal and equitable claims against him and his stock, it is apparent the equities are with the Bank and against the Insurance Company. Such considerations are controlling considerations with the courts in cases of this character.

It is apparent that any party taking an assignment of Levi's stock, by way of purchase or by way of security, took simply those rights which he possessed thereunder, and took with notice of any demands of the Bank thereon because of any loans it had previously made to Levi. The very object of putting the notice in the stock, and thus calling attention to the articles of association and the by-laws, was to protect purchasers or incumbrancers from being misled by Levi because he retained possession of the certificates of stock. In this way, the Bank put itself in a position where it would not be asserting a secret lien or demand against the stock, but where it would be asserting a claim thereon of which it had given notice in advance, and as to which any purchaser or incumbrancer being thus put on inquiry, was bound to know the truth. The fact that from December 3, 1890, when the first loan was made by the Insurance Company, to June 30, 1896, when the Insurance Company in form sold this collateral to itself, the Insurance Company did not seek an

assignment of this stock on the books of the Bank, or demand dividends thereon, is very significant evidence as to the real rights of the parties to this litigation.

The reason why the Insurance Company should not be permitted to get an advantage over the Bank that Levi or his estate could not have obtained June 30, 1896, under such circumstances, is well stated by Mr. Greenleaf in his classical work on "Evidence."

The clause in the stock in question is to be deemed as effective as a recital in a deed, and "as conclusive evidence * * * * against the parties and all others claiming under them *in privity of estate.*"

1 Greenleaf on Evidence, Section 23, and authorities cited in late editions.

This language is used by Mr. Greenleaf with reference to recitals in deeds, but surely the notice contained in this stock is not less effective than it would be if the stock recited the facts that the Insurance Company was notified to inquire about, and would have learned had it made such inquiry.

The theory of this rule of privity is, that when a man sells or mortgages lands or personal property, he tells the truth concerning its status. Therefore, the law deems the purchaser or the incumbrancer privy in estate with the vendor or mortgagor. If he would not be bound because of such privy in estate, the party seeking to evade the obligations of his vendor or mortgagor is bound to show good faith, and that he bought, or loaned money, without notice that it would put him on inquiry as to the facts, or without notice of the facts.

As to negotiable paper, if the paper be sold before its maturity, the presumption is that the purchaser is a purchaser in due course of business, and the burden is upon the other party to show otherwise; but as to choses in action and all other classes of property, the presumption is that the purchaser or incumbrancer knows all that his vendor or mortgagor knew, and such purchaser or incumbrancer must show the contrary, and the absence of any notice putting him on inquiry, if he would escape those rules of law, or those rules of equity, that apply as between his vendor or mortgagor and the person or corporation whose

rights may be impaired by a sale or mortgage to a person in good faith, without notice putting him on inquiry as to the truth.

There was a long struggle to save creditors who proceed in court by attachment, execution or otherwise, from the operation of rules of law or equity compelling them to take only such rights as the debtor had, upon the ground that it was unjust to such creditors to make them assume the charges or liens of the debtor of which they had no notice, but the courts persistently held that a creditor could not escape the rule of law that makes a purchaser or incumbrancer of a chose in action take only those rights of the vendor. The courts refuse to put an attaching or an execution creditor in the same position occupied by a creditor or purchaser without notice.

This appears from the careful opinion of Lowell, C. J., in *Continental Nat. Bk. vs. Eliot Nat. Bk., 7 Fed. Rep., 371*, where he says:

"It is a general rule that creditors, whether they proceed by "an attachment on *mesne process*, seizure on execution, creditor's "bill, or through an assignee in bankruptcy, must take their "debtor's property subject to all *equitable* as well as legal charges, "liens, or opposing titles."

And the learned Judge cites English and American authorities to show that this is a very old and a very well settled rule. Certainly, this being the rule of law, a party like the Insurance Company, which takes with notice of the very claims which the Bank is now asserting, cannot claim to be in any better position than such creditors.

So, too, in a case in this court where a party loaned money to another upon a certificate of bank stock, in good faith, because of false representations with respect thereto, the court, nevertheless, held that the by-law of the bank and the certificate of stock in the bank were in such form as to put such party on notice of the demands of the bank, *which were precisely of the same character as those of the Bank here*, and, therefore, that such party had no remedy against the bank there.

Moores vs. Bank, 111 U. S., 156.

The facts in that case, and the very well considered opinion of Gray, J., are such as to be controlling here upon this point. The by-law of the bank there contained this language:

"No transfer of the stock of this association shall be made, "without the consent of the board of directors, by any stock-"holder who shall be liable to the association, either as principal "debtor or otherwise; and certificates of stock shall contain "upon them notice of this provision." (*P. 157.*)

The certificate of stock there involved was made out directly to the party making the loan, and the only language it contained giving any notice of any claims or demands of the bank, was this language (*p. 158*):

"Transferable only on the books of the bank, in person or by "attorney, on the surrender of this certificate."

From this language, it will be seen that the notice there given was quite ambiguous and indistinct, as compared with the distinct and clear notice here given of the rights or claims the Bank had or might have against the stock of Levi.

The Court there said (*pp. 164–165*):

"The certificate which he delivered to the plaintiff was not in "his name, but in hers, stating that she was entitled to so much "stock, and showed, upon its face, that no certificate could be "lawfully issued without the surrender of a former certificate "and a transfer thereof upon the books of the bank. The by-"laws, passed under the authority expressly conferred by the act "of Congress under which the bank was organized, contained a "corresponding provision, designed for the security of the bank "as well as of persons taking legal transfers of stock without "notice of any prior equitable title therein. *Union Bank vs. "Laird, 2 Wheat., 390; Black vs. Zacharie, 3 How. 483, 513.* "The very form of the certificate was such as to put her upon her "guard. She was not applying to the bank to take stock, as an "original subscriber or otherwise; but she was bargaining with "Robert B. Moores for stock which she supposed him to hold as "his own. She knew that she had not held or surrendered any "certificate, and she never asked to see his certificate or a transfer

"thereof to her; and he in fact made no surrender to the bank "or transfer on its books. She relied on his personal representa- "tion, as the party with whom she was dealing, that he had "such stock; and she trusted him as her agent to see the proper "transfer thereof made on the books of the bank. Having dis- "tinct notice that the surrender and transfer of a former certifi- "cate were prerequisites to the lawful issue of a new one, and "having accepted a certificate that she owned stock, without "taking any steps to assure herself that the legal prerequisites to "the validity of her certificate, which were to be fulfilled by the "former owner and not by the bank, had been complied with, "she does not, as against the bank, stand in the position of one "who receives a certificate of stock from the proper officers with- "out notice of any facts imparing its validity.

"Of the great number of cases referred to in the thorough and "elaborate arguments at the bar, we shall notice only some of "the most important. None of those cited by the learned coun- "sel for the plaintiff affirm a broader proposition than this: A "certificate of stock in a corporation, under the corporate seal, "and signed by the officers authorized to issue certificates, estops "the corporation to deny its validity, as against one who takes it "for value *and with no knowledge or notice of any fact tending to "show that it has been irregularly issued.*"

Here follows a very thorough examination of the cases, English, national and state, including those of New York State, to show that the learned Judge was abundantly supported by the decided cases in his statement of the law.

I will not take the time and paper to go into further authorities on this point, because if it is not established by such deliberately adjudicated cases in this court, based upon numerous cases elsewhere adjudicated, I would probably waste my time in an effort to establish it now for the first time.

(c) *Equitable Lien.*

I have already called attention to the language of *Lowell, C. J., in Cont. Nat. Bk. vs. Eliot Nat. Bk., 7 Fed. Rep., 371,* which shows that an equitable lien is one that will remain against an execution

creditor, and is, therefore, one, I contend, that continues as against a creditor like the Insurance Company, which takes charged with notice of the existing rights of the Bank.

It will be noted that the Bank's claim is not rested upon its claim of an equitable lien alone. The position of the Bank is that if the articles of association, the by-law of the Bank, and the certificate of stock, did not give it a legal and equitable right to insist that its demand be paid before the stock should be transferred to the Insurance Company by Levi, then the arrangement entered into with Levi when his loan was extended, and a further loan was made to him, gave it a right to an equitable lien upon his stock. Had Levi refused to bring in the stock on demand, the Bank could have brought an action in equity to establish a lien thereon, and have such stock sold to satisfy its demands, because of the agreement of Levi with the Bank.

This was the situation and long had been the situation when Levi obtained his first loan from the Insurance Company December 3d, 1890. Possession of the stock certificates was not necessary that the Bank might have such an equitable lien. The stock certificates are not the stock, but are only evidence of the stockholder's right to the stock and any dividends or distribution of property to which he might be entitled as a stockholder.

The Bank therefore, came squarely within the discription of equitable liens which we find in authorities of the highest character. Mr. Pomeroy says:

"It is simply a right of a special nature over the thing, which "constitutes a charge or encumbrance upon the thing, so that the "very thing itself may be proceeded against in an equitable "action, and either sold or sequestered under a judicial decree, "and its proceeds in the one case, or its rents and profits in the "other, applied upon the demand of the creditor in whose favor "the lien exists. It is the very essence of this condition that, "while the lien continues, the possession of the thing remains "with the debtor or the person who holds the proprietary interest "subject to the encumbrance. The equitable lien differs es- "sentially from the common law lien, which is simply a right to "retain possession of the chattel until some debt or demand due "to the person thus retaining is satisfied; and possession is such

"an inseparable element, that if it be voluntarily surrendered by "the creditor, the lien is at once extinguished."

3 Pomeroy's Equity Jurisprudence, Sec. 1233.
See also Sec. 1234, and 1 Pomeroy's Equity Ju., Secs. 165 to 172.

(*d*) *The National Banking Act Does Not Forbid the Transaction in Question.*

In answer to the claim of the Third National Bank, it is suggested that the statute forbids the arrangement made between Levi and the Bank when he got an extension of time upon one loan and an additional loan. But the statute does not forbid a bank from taking an equitable lien on stock of a stockholder, if the stock certificates of the bank are in such form as to charge a party with notice of any demands the bank may have against the stock. *The statute expressly permits a bank to take title to or security upon its own stock, and that means either a legal or equitable lien thereon, if "such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."*

U. S. R. S., Section 5201.

The Court below evidently lost sight of this important provision of the statute, or its application to the facts of this case.

This being the provision of the statute, the Third National Bank had the legal right to put its stock certificate in the form it did. Had the Insurance Company inquired of the Bank before making its loan, or brought its certificates of stock to the Bank to be transferred on the books of the Bank, before making its loan, the Insurance Company could not have been harmed or injured in any way, shape or manner.

The statute, the articles of association, the by-law, and the stock certificate alike provide that this stock was only transferable to the Insurance Company upon the books of the Bank, with consent of the directors of the Bank, at a time when Levi was not indebted to the Bank.

This being so, good faith on the part of the Insurance Company, and ordinary business judgment, required that the Insurance Company bring the certificates of stock to the Bank and

request the Bank to transfer such stock upon its books before the Insurance Company should make any loan whatever to Levi thereon. Had the Insurance Company done this, and had the Bank refused to make the transfer, the Insurance Company would not have been harmed. The Insurance Company, or Levi, could have brought an action to compel such transfer, and in such an action it cannot be doubted that the Bank would have prevailed until Levi or the Insurance Company should tender the Bank the amount of its loan. He who seeks equity must do equity, and had the Insurance Company or Levi sought to compel a transfer of this stock on the books of the Bank before the Bank's loan was paid, a Court of Equity would not have compelled such transfer until the Bank's equitable lien thereon was satisfied.

Under the practice prevailing in the State of New York, the Bank's equitable demand is a perfect defense to any suit brought by the Insurance Company to compel the transfer of this stock on the books of the Bank. And this Court will not lose sight of the fact that in the case of *Knight vs. Old National Bank, 3 Cliff., 429*, the same thing was held, after careful consideration of this subject. Indeed, that case goes further and holds that under the Act of Congress, as amended in 1864, a certificate of stock that gives notice of the rights of a bank, entitles the bank to refuse a transfer of its stock until the holder of such certificate has paid the demands of the bank against him.

We contend that the statutes and the authorities abundantly sustain this position.

(*e*) *The Certificates of Stock giving notice of the Bank's rights, the Insurance Company cannot ignore them, even if the regulations of the National Banking Act were violated in making the by-law and issuing stock certificates in this form.*

This is so because the National Banking Act does not enable the Insurance Company to take an advantage that its assignor, Levi, could not have taken because the Bank may have violated some provision of the National Banking Act.

A great English chancellor long since stated the true reason for the rule of law on this subject:

"In the case of *Le Neve vs. Le Neve, (3 Atk., 646)*, Lord Hard-
"wicke said, 'It would be a most mischievous thing, if a person
"'taking advantage of the legal form appointed by an act of
"'Parliament, might, under that, protect himself against a per-
"'son who had a prior equity, of which *he had notice.*'"

Quoted and approved in Dunham vs. Dey, 15 Johns., 555, op. 570.

This principle has met the approval of this court in construing the National Banking Act. That Act expressly forbids loans upon securities on real property. Nevertheless, when such loans have been involved, the state courts have been reversed where they have held, as the Court of Appeals in New York did in *Crocker vs. Whitney, 71 N. Y., 161*, that such mortgages were void and unenforceable.

In like manner, a national bank is forbidden to certify a check which does not represent a deposit. Nevertheless, where this regulation is violated, the check is not thereby rendered void. Thus we see that neither the customer of the bank nor the bank itself is permitted to take advantage of a violation of the statute, when the statute does not expressly make a check, mortgage, or security, void because the statute has been violated.

The rule of law on this subject is thus tersely stated in *Thompson vs. St. Nicholas Bank, 146 U. S., 251:*

"Moreover, it has been held repeatedly by this court that
"where the provisions of the national banking act prohibit cer-
"tain acts by banks or their officers, without imposing any
"penalty or forfeiture applicable to particular transactions which
"have been executed, *their validity can be questioned only by the*
"*United States and not by private parties. National Bank vs.*
"*Matthews, 98 U. S., 621; National Bank vs. Whitney, 103 U. S.,*
"*99; National Bank of Xenia vs. Stewart, 107 U. S., 676.*"

II.

The authorities do not hold that the German Insurance Company can compel the Bank to transfer its stock upon its books until its claim against the Levi estate has been paid.

It would be impossible to review all the cases that have been cited to sustain the position of the Insurance Company. We

may only call attention to the governing principle controlling those cases, and call attention to a few of the leading cases. We may note that the cases most favorable to the Insurance Company are the cases in the State of New York. As Clifford, J., showed in his careful opinion in *Knight vs. Old National Bank, 3 Cliff., 429*, some of those cases are not consistent with the adjudicated cases in other states or in the Supreme Court of the United States. It is not necessary, however, that we go into detail on this subject. It will suffice to say that even the cases in the State of New York, and the cases cited for the Insurance Company from the reports of this Court, alike recognize the controlling force and effect of a certificate of stock which gives notice to any purchaser or incumbrancer thereof of the claims of the corporation against the stockholder who seeks to sell or incumber his stock. Not one of these cases holds that the certificate of stock, and the notice it gives, can be ignored, if that certificate of stock is based on a by-law, and the by-law, in turn, has some support in a statute; or in the official act of an official under the statute, like the comptroller who controls the national banks of the United States.

Wherever the certificate of stock fairly gives notice of the rights of the corporation issuing the stock, the party who would purchase such stock, or take it as security, is bound to take notice of the claims of the corporation upon it. Being bound to take notice thereof, the purchaser or encumbrancer with notice simply steps into the shoes of the vendor, pledgor, or mortgagor.

An examination of numerous cases to which we shall not refer, will disclose almost universally the stress laid by the courts upon two facts: 1. Was the by-law declaring the stock could not be transferred until the stockholder paid the corporation, one of which the certificate of stock gave notice to the purchaser or encumbrancer, or was the claim asserted in the nature of a secret lien, of which the purchaser or encumbrancer would receive no notice from the certificate of stock itself? 2. And of the same nature is the stress laid upon whether or not the purchaser, pledgor, or other encumbrancer, is shown to have been a *bona fide* purchaser or encumbrancer without notice of the rights asserted by the corporation as to such stock, if the stockholder holding it was indebted to the corporation.

For instance, in *Driscoll vs. Mfg. Co., 59 N. Y., 96*, in the statement of facts we read:

"Neither the plaintiff nor Bartlett had actual notice of Brad-
"ley's alleged indebtedness, nor of the by-law last above-
"mentioned, when they acquired the stock." (*P. 98*).

In the careful opinion of Folger, J., he says (*p. 101*):

"No limitation nor restriction of this ownership nor of this
"power of transfer, was declared or suggested in the certificate."

Of shares of stock, the learned Judge later says (*p. 105*):

"The right to them is a chose in action, and though not trans-
"ferable, so as to give the same safety in dealing, as is given to
"a *bona fide* taker of negotiable paper, the current of authority
"*in this State* is to the protection of the *bona fide vendee*, against
"*secret* or equitable claims thereto of one who has indued the
"vendor with *indicia* of ownership. * * * *

"Now we do not assert that it is not possible to legally abridge
"this right. There may be power given by statute so to do.
"There may be, in some cases, an agreement of the original
"stockholders, among themselves, by their articles of association,
"that such power shall exist. The latter, as we have seen, does
"not appear in this case."

But it does appear in the case at bar.

Again the Court says, after reviewing many authorities, showing how numerous are the cases, that an assignee only takes the rights of his assignor:

"But no authority is cited for the further position that a *bona*
"*fide* purchaser of stock, without knowledge *or notice of* such
"usage or *regulation derived from the contents of the certificate*, or
"otherwise, is bound thereby." (*P. 109*).

The Appellate Division did not find such authorities inconsistent with our position in this case. Adams, J., in a very carefully considered opinion, considering the case last quoted, and like cases in the United States Supreme Court, and also cases in New York and Massachusetts Courts, thus stated the reason why the Court thought the case at bar was not controlled by such authorities:

"But in this instance, as we have seen, the certificates were "not in the usual form, for they contained what was equivalent "to an announcement to the whole world that the stock which "they represented was subject to a possible lien in favor of the "corporation issuing the same, and that such stock would not be "transferred upon the books of the corporation until that lien was "satisfied. Consequently, when the certificates in question came "into the plaintiff's possession, it was with full notice of the "defendant's rights, whatever they might be and, therefore, the "plaintiff took the same subject to whatever equities existed "against the title of the pledgor.

Buf. German Ins. Co., vs. Third Nat. Bank, opinion 29, App. Div., pp. 141, 142.

Upon the first appeal the Court of Appeals reached a different conclusion, *in 162 N. Y., 163*, and that decision is the one which was followed by all the Courts in the decision now here for review. The ground of the decision of the Court of Appeals may be found in two sentences, which I quote:—

"I should say that there was a marked difference between any "such claim of the Bank, which slights a provision of the Bank-"ing Law, intended to negative the right to a lien and to confer "the valuable character of transferability upon national bank "shares, in the public interests, and a claim which a borrower, "or his representative, asserts against the right of a national "bank, as his creditor, to realize its debt upon securities which "have been held by it in pledge, *though not within the class of "those it was authorized to hold.* * * * How can it "reserve to itself a right to a lien upon shares of its own stock, "in contravention of the provisions of the National Banking "Act, and become entitled to demand of the Courts to enforce it "as against a purchaser of the shares, whose title thereto is acquired *bona fide* and for value?

(*Opinion 162 N. Y., 171, 177; record, pp. 24, 28.*)

It will be observed from these quotations that the Court below really rests its decision upon two propositions: 1—the National Banking Law prohibits the making of the by-law, the certificate, and the loan to Levi, as stated; 2—that the plaintiff is to be

treated as a *bona fide* purchaser or encumbrancer of the Levi stock.

An examination of the opinion will show that these two propositions are rested upon the decisions in *Bank vs. Lanier, 11 Wall., 369, and Bullard vs. Bank, 18 Wall., 594*, and the cases, state and national, which have followed and applied those cases.

Without going into the cases in other Courts that have followed or applied those cases, is there anything in *Bank vs. Lanier*, or *Bullard vs. Bank*, going to any such length as it is necessary to go to determine this case in favor of the Insurance Company and against the Bank?

Bank vs Lanier was a case of purchase. The character of the certificates of stock there involved is not disclosed. The Court there says:

"If we assume that the certificates in question are not different "from those in general use by corporations—and the assumption "is a safe one—it is easy to see why investments of this character "are sought after and relied upon." (*P. 377.*)

Of the purchasers the Court said:

"*They bought for value, without knowledge of any adveree claim, "in full faith that the bank would observe its engagements, and pur-"sued in all respects the directions given in the certificates.*" (*Opinion, p. 378.*)

Here, then, we have a clear case of a *bona fide* purchase for value, without notice, where the Court assumed that the certificate was absolutely silent as to any claim the bank could possibly have thereon as against the holder thereof. It appears, according to the case, that there was nothing there to give the purchaser notice of any by-law attempting to prevent the transfer of such stock if the holder thereof was indebted to the bank. That case, therefore, is no authority for the German Insurance Company here.

In *Bullard vs. Bank*, Bullard claimed the stock as part of the assets of the bankrupt, and demanded that the bank transfer the stock to him. There, again, the case is silent from beginning to end concerning anything in the certificate of stock giving notice that the stock could not be transferred while the holder was

indebted to the bank. There the bank undertook to maintain its position solely by virtue of the by-law, without any provision in the certificate of stock, or articles of association, apparently, upon which to rest such by-law. Justice Clifford dissented from the opinion in the case, because he thought the opinion in *Knight vs. Bank*, from which we have heretofore quoted, correctly stated the law. Justice Strong did not refer to the opinion in the *Knight Case*, but rested the decision in the *Bullard Case* squarely upon the decision of *Bank vs. Lanier*. There is, therefore, nothing in the *Bullard Case* that brought up for decision the question of whether or not, if the certificate of stock is in the form of that here presented, and the transaction took the form of the transaction with Levi, Levi's assignee of such certificate of stock would stand in his shoes.

Our position is that Levi's assignee is in the same position that a man is in who purchases a farm subject to a bond and mortgage that is usurious. The owner of the farm might successfully resist such bond and mortgage, but the purchaser of the farm cannot. He is in the same position as a man who leases a piece of real estate. Such man cannot question the title of his lessor, although another person might successfully question such title. So, here, the Insurance Company is privy in estate with Levi, and because Levi could not question the rights of the Bank, the Insurance Company, as his assignee, that has received notice of the Bank's rights through the certificate of stock, is in the same position in which Levi was placed.

(*a*) *Executed Transactions.*

It is suggested that the rule laid down by this Court in the case of mortgages of real estate to a national bank, despite the National Banking Act, does not apply to a case of this character, because there is a broad distinction between executed contracts and executory contracts.

There is a broad distinction between executed contracts and executory concracts. The Court of Appeals, however, did not show its usual learning in its observations on this subject. When a national bank is foreclosing a mortgage, it is foreclosing that mortgage because that mortgage is an *executory contract*. A

national bank would not have to come into a court of equity to foreclose its mortgage, to enforce its rights, if the mortgage was an executed contract and not an executory contract. For this reason our Court of Appeals once thought that a court of equity was bound to refuse its aid to a national bank in a foreclosure, because to aid a bank in a foreclosure would be to aid it to violate the Act of Congress, and render that Act a nullity. But this Court corrected that erroneous impression, as we have shown, by pointing out to the Court of Appeals that the borrower could not be permitted to take advantage of such a plea, since it had reference to a regulation of the bank by the Government, which regulation the Government alone is to enforce.

So here, all the provisions of the National Banking Act about loaning money upon the stock of the Bank, are regulations of National Banks by the Government. If the Bank disregards those regulations, the borrower of its money should not be permitted to take advantage of them, for the reasons given by Chancellor Hardwicke.

Upon what theory, then, can it be said that the Bank can enforce its mortgage in a Court of Equity, but cannot ask a Court of Equity to protect it in a suit of this character?

If the Bank can enforce its mortgage, why may it not insist that a party obtaining its certificates of stock, with notice of its claims, cannot have those certificates transferred on its books until its claims have been satisfied? Had the party who obtained those certificates brought them to the Bank for transfer on its books before loaning money upon them, as good faith and good law alike would require, no possible harm could have come to that party, or to the Bank.

We thus see that the Insurance Company is compelled to bring this action against the Bank to have it transfer the stock upon its books, because the transfer by Levi to the Insurance Company is not a completed transfer, and the contract is still executory and not an executed contract. But the Bank has loaned the money to Levi, and its contract of loan has been executed and is no longer executory. Consequently, if there really was anything in this principle applicable to this case, the Bank may very well insist that, having loaned its money in good faith to a stockholder

and creditor, and extended the time of payment for him, because of the security agreed to be furnished by the stockholder, that stockholder's assignee should not be permitted to force the Bank to transfer that stock on its books, when the debtor of the Bank would not be permitted to force such a transfer.

The very bringing of this action shows that the Insurance Company is dealing with an executory and not with an executed contract, and consequently the principle invoked below has no application to this case.

(*b*) *Public Policy.*

It is suggested that public policy requires that this Court decide that the Insurance Company is entitled to have the stock transferred on the books of the Bank, because otherwise banks will ruthlessly violate provisions of the National Banking Act.

This suggestion is quite as applicable to the cases of real estate mortgages, and cases of certifying checks where deposits have not been made, as it is to cases of this character. Indeed, there are comparatively few stockholders in such banks, and comparatively few transfers of bank stock that will become involved, as compared with the number of cases that arise because checks are certified where deposits are not made, or mortgages are taken contrary to the provisions of the National Banking Act.

Moreover, there is no principle of public policy that requires this Court to decide this case in favor of the German Insurance Company as against the Bank. Suppose this Court determines that where the certificate of the Bank stock is in such form as to give notice of the Bank's claim, a party taking the same as security, *without having the same transferred upon the books of the Bank, in accordance with its by-laws*, and holding it for years as such security, without giving notice thereof, or demanding dividends thereon, is not entitled to force the Bank to transfer such stock upon its books until the Bank has been paid its demands against the holder thereof, in accordance with his agreement with the Bank concerning the stock, will the law, or any principle of justice, receive any severe wrench?

Where is any principle of public policy involved in holding that there is a broad distinction between cases of by-laws of cor-

porations undertaking to assert a secret lien upon the stock of the corporation as against *bona fide* purchasers or encumbrancers thereof, and cases holding that if the stock of a corporation gives notice of the rights claimed by the corporation thereon, the party taking such stock merely steps into the shoes of the holder thereof, and holds it subject to the same claims that rested upon it at the time of the attempted transfer?

The Bank being prior in right, and having parted with its money in good faith, under the very provisions of the section of the National Banking Act which we have quoted, why should the Court refuse to protect the Bank in its rights, or why should the Court compel a transfer of stock on the books of the Bank, when thereby it will give greater rights to the Insurance Company than Levi had or could transfer to it? In the absence of any finding that the Insurance Company is a *bona fide* holder of such stock, and in a case where the certificate of stock shows it had notice of the claims made by the Bank thereon, why should the Bank be compelled to pay the Insurance Company upwards of $12,000 of dividends and interest, that are otherwise applicable to the payment of the demands of the Bank against Levi?

As the Insurance Company is sure of the stock in any event, why should the Bank not be permitted to retain dividends enough to pay it, in exact accordance with the agreement of Levi, and with the understanding evidenced by the certificate of stock itself?

Why should this Court not apply this same principle of justice and fair dealing that it applied in the *Whitney Case*, when it reversed that case, as reported in *71 N. Y., 161*, and enabled the Bank to foreclose its mortgage, as it did in *103 U. S., 99*.

III.

It follows that the judgment of the Supreme Court of the State of New York, and of the Court of Appeals of the State of New York, should be reversed, and this case should

be remanded to those courts, with directions to enter a decree accordingly.

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